Office-Supreme Court, U
FILED
APR 24 1981

No. 80-1506

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARIZONA FUELS CORPORATION AND EUGENE DALTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

WILLIAM KANTER
MARK H. GALLANT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court properly awarded summary judgment to the government and imposed a civil penalty against petitioners as a consequence of their failure to satisfy uncontested obligations accruing under the Oil Oil Allocation Program, promulgated under the Emergency Petroleum Allocation Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Cities Service Co. v. *FEA*, 529 F.2d 1016, cert. denied, 426 U.S. 947	3
Consumers Union of the United States, Inc. v. *Sawhill*, 525 F.2d 1068	3
Pasco, Inc. v. *FEA*, 525 F.2d 1391	3
United States v. *Dalton*, No. CR 76-97 (D. Utah 1976)	6

Statutes and regulations:

Department of Energy Organization Act, 42 U.S.C. (Supp. III) 7101 *et seq.*	2
Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*	2
Section 4, 15 U.S.C. 753	2
Section 5, 15 U.S.C. 754	7
Section 5(b), 15 U.S.C. 754(b)	2
Federal Energy Administration Act of 1974, 15 U.S.C. 761 *et seq.*	2
10 C.F.R. 205.50(a)(1)	5
10 C.F.R. 205.50(c)	5
10 C.F.R. 205.100 *et seq.*	5
10 C.F.R. 205.105	5
10 C.F.R. 205.203	7
10 C.F.R. 211.66	4
10 C.F.R. 211.67	3, 4
10 C.F.R. 211.67(b)	5

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES—Continued

Statutes and regulations (Continued):	Page
10 C.F.R. 211.67(c)	5
10 C.F.R. 211.67(e)	3
10 C.F.R. 211.67(m)	4
10 C.F.R. Part 212, Subpart D, 39 Fed. Reg. 1949 (1974)	2
10 C.F.R. 212.72	2
10 C.F.R. 212.73	2
10 C.F.R. 212.74	2
10 C.F.R. 212.83(c)(2)	4
18 C.F.R. 1.40(e)(4)	5
Miscellaneous:	
Executive Order No. 11748, 38 Fed. Reg. 33575 (1973)	2
Executive Order No. 12009, 42 Fed. Reg. 46267 (1977)	2
Executive Order No. 12287, 46 Fed. Reg. 9909 (1981)	3
38 Fed. Reg. 22536 (1973)	2
46 Fed. Reg. 12945-12948 (1981)	3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1506

ARIZONA FUELS CORPORATION AND EUGENE DALTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-23a) is reported at 638 F.2d 239. The orders of the district court (Pet. App. 1a-14a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1980. A petition for rehearing was denied on February 2, 1981 (Pet. App. 25a). The petition for a writ of certiorari was filed on March 4, 1981. The jurisdiction of this Court is invoked under

Section 5(a)(1)(A) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1)(A), which incorporates by reference Section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. 1904 note, and 28 U.S.C. 1254(1).

STATEMENT

1. In response to nationwide petroleum shortages caused in part by inadequate domestic production and the Arab oil embargo, Congress enacted the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* The Act granted the President broad authority to allocate and set prices for crude oil and refined petroleum products in order to alleviate present or threatened economic hardships resulting from petroleum shortages. 15 U.S.C. 753.

Pursuant to that authority, as delegated by the President, the Cost of Living Council established a "two-tier" pricing system for crude oil. 38 Fed. Reg. 22536 (1973).[1] Under that system, crude oil was classified as either "old oil" or "new oil."[2] The system imposed a ceiling price for "old oil" substan-

---

[1] Under Section 5(b) of the EPAA, 15 U.S.C. 754(b), the President established the Federal Energy Office to exercise his authority under that statute. Executive Order No. 11748, 38 Fed. Reg. 33575 (1973). The FEO adopted the two-tier system without substantial change. 10 C.F.R. Part 212, Subpart D, 39 Fed. Reg. 1949 (1974). Under the Federal Energy Administration Act of 1974, 15 U.S.C. 761 *et seq.*, the FEO became the Federal Energy Administration. Under the Department of Energy Organization Act, 42 U.S.C. (Supp. III) 7101 *et seq.*, and Executive Order No. 12009, 42 Fed. Reg. 46267 (1977), the Department of Energy assumed the functions of the FEA.

[2] The rules governing the classification of crude oil are complex and are not at issue in this case. We therefore do not describe them here. The governing regulations are codified in 10 C.F.R. 212.72, 212.73, and 212.74. Brief explana-

tially below the prices that could be charged for "new oil."[3]

Because of the different price ceilings applicable to "old oil" and "new oil," those refiners having access to substantial quantities of "old oil" enjoyed a significant competitive advantage over refiners whose raw material supplies consisted primarily of "new oil." In order to distribute access to the relatively inexpensive "old oil" in a more systematic and equitable way, the Federal Energy Administration adopted the Old Oil Allocation Program (also known as the Entitlements Program) in November 1974. 10 C.F.R. 211.67. The program was sustained by the court of appeals in *Cities Service Co.* v. *FEA*, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975), cert. denied, 426 U.S. 947 (1976), and in *Pasco, Inc.* v. *FEA*, 525 F.2d 1391 (Temp. Emer. Ct. App. 1975). Its validity is not challenged in the present litigation.

Under the Entitlements Program, each refiner was required to have one entitlement for each barrel of "old oil" that it refined in a given month. Entitlements were issued to refiners each month on the basis of their proportionate share of the total amount of crude oil refined during that month throughout the nation.[4] Refiners whose crude oil supplies included a

---

tions of the "old oil-new oil" scheme may be found in *Pasco, Inc.* v. *FEA*, 525 F.2d 1391, 1394-1395 & n.8 (Temp. Emer. Ct. App. 1975), and in *Consumers Union of the United States, Inc.* v. *Sawhill*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975) (en banc).

[3] Through Executive Order No. 12287, 46 Fed. Reg. 9909 (1981), the President prospectively decontrolled crude oil and thus eliminated the two-tier pricing system. See also 46 Fed. Reg. 12945-12948 (1981).

[4] Small refiners were given the benefit of additional entitlements allocated in accordance with the regulations' "small refiner bias." 10 C.F.R. 211.67(e).

disproportionately large quantity of "old oil" were required to purchase entitlements from refiners that did not have access to and therefore did not refine their proportionate share of the total amount of "old oil" available nationwide. Each month, FEA (and later, the Department of Energy) published in the Federal Register a list establishing the number of entitlements each refiner was required to purchase or sell, the value of the entitlements to be transferred, and the date by which the entitlement transactions were to be completed (usually the last day of the month in which the list was published). These determinations were based on the refiners' reports to the agency concerning the volume and kind of crude oil processed each month. See 10 C.F.R. 211.66 and 211.67.

As is apparent from the structure of the Entitlements Program, the failure of any refiner to meet its purchase obligations in a timely fashion adversely affected other refiners who had processed more than their share of "new oil" and were therefore in a position to sell entitlements.[5] Because delinquent purchasers would have enjoyed an undue market advantage at the expense of their competitors, the regulations required that purchase and sale transactions be

---

[5] Until October 1977, this burden was borne directly by the specific sellers that happened to have been designated to have their entitlements purchased by the specific purchasers that proved recalcitrant. In October 1977, in order to alleviate the problems caused by petitioner Arizona Fuels Corporation's repeated refusals to purchase the required entitlements, DOE created an accounting entity, known as "Consolidated Sales," to spread the losses among all participating refiners. Unrecovered losses to specific sellers or the Consolidated Sales fund ultimately were passed along to consumers in the form of increased oil costs. See 10 C.F.R. 211.67(m) and 212.83(c)(2).

completed within a specified period of time. 10 C.F.R. 211.67(b) and (c).

Every refiner had the right to appeal its entitlement obligations on the merits (*i.e.*, to contest the order to purchase or sell a specific number of entitlements) (see 10 C.F.R. 205.100 *et seq.*) or to apply to the Office of Hearings and Appeals of DOE for "exception relief" from its obligations on the basis of "serious hardship or gross inequity" (see 10 C.F.R. 205.50(a)(1)). But because the Entitlements Program operated essentially on a zero-balance basis and depended for its success on the mutual cooperation of all participants, neither the filing of an appeal nor a request for exception relief operated to relieve a refiner of its monthly purchase or sale obligations. If administrative proceedings subsequently established that a particular refiner deserved some form of relief, the agency ordinarily afforded the necessary remedy through an adjustment to the refiner's entitlement status in a later month. Any refiner desiring some more immediate dispensation from the monthly purchase or sale obligations was required to obtain an administrative stay pending further review. See 10 C.F.R. 205.105 (stay or temporary exception pending appeal on the merits); 10 C.F.R. 205.50(c) (filing application for exception relief does not constitute grounds for non-payment); 18 C.F.R. 1.40(e)(4) (stay required to excuse obligations pending appeal to Federal Energy Regulatory Commission).[6]

2. Petitioner Arizona Fuels Corporation ("AFC") is a small independent refiner. Petitioner Dalton is AFC's president and sole stockholder (Pet. App. 16a,

---

[6] Before the creation of FERC in 1977, adverse final decisions of the OHA on requests for exception relief were immediately subject to judicial review in the district court. Such review now lies first with the Commission.

17a). From the inception of the Entitlements Program until August 1975, AFC refined a disproportionate share of "new oil" and therefore regularly sold monthly entitlements to other refiners.[7] Beginning in August 1975, however, AFC refined a disproportionate share of the lower-priced "old oil" and thus was required to buy entitlements each month (*id.* at 17a). Except on two occasions, when it acted under pain of judicial contempt, AFC has flouted the agency's final purchase orders since August 1975 and has not paid its entitlement obligations (*id.* at 2a).

For example, the FEA stayed AFC's August 1975 purchase obligations until November 30, 1975, to enable AFC to complete the sale of entitlements from previous months. Upon completing the sale, AFC, acting in violation of the FEA's order, used the proceeds for purposes other than the payment of its August 1975 obligations. This action was the first in a long series of similar refusals by AFC to obey FEA and DOE purchase orders. See R. 15-19, 26-29. AFC never appealed on the merits any of the entitlement obligations involved in its petition. In other words, it never disputed that the proper application of the FEA and DOE regulations to its business yielded the obligations asserted by the government. AFC did apply for exception relief from the entitlement obligations, and DOE's Office of Hearings and Appeals granted partial exception relief.[8] AFC did

---

[7] On the basis of his activities during that period, petitioner Dalton was convicted of mail fraud for selling the same entitlements twice. *United States* v. *Dalton*, No. CR 76-97 (D. Utah 1976).

[8] For instance, based on hardship evidence submitted by AFC, and notwithstanding AFC's repeated disregard of agency orders, the FEA granted partial relief in the amounts

not seek judicial review of the OHA decisions insofar as they denied in part the requested exception relief for the August 1975-June 1977 obligations.[9]

3. In September 1977, the United States filed a complaint in the United States District Court for the District of Arizona to enforce AFC's then-outstanding entitlement purchase obligations of more than $1 million. The complaint also sought: (i) civil penalties based on petitioners' repeated and continuing violations of FEA and DOE purchase orders;[10] (ii) an injunction requiring AFC to meet its future entitlement obligations as they accrued; and (iii) an injunction prohibiting petitioner Dalton from transferring or encumbering AFC's assets (R. 20-21). Petitioners filed a counterclaim challenging the partial denial of exception relief.

Following a hearing, a temporary restraining order was entered on September 27, 1977, requiring petitioners to meet their monthly purchase obligations on a timely basis and not to waste AFC's assets. Following another hearing, an order was entered on November 29, 1977, extending the restraining order in-

---

of approximately $141,000 per month for the period November 1976 through April 1977, and approximately $59,243 per month for the period May 1977 through October 1977. AFC failed to satisfy its obligations to other refiners even after such relief was granted (R. 19, ¶ 56).

[9] AFC did appeal to FERC those partial denials of exception relief for entitlement obligations that arose after July 1977.

[10] The relevant civil penalty provisions are contained in 15 U.S.C. 754 and 10 C.F.R. 205.203. They authorize the imposition of civil penalties of up to $20,000 per day for violations of agency regulations concerning "the production, distribution or refining of crude oil."

definitely by stipulation of all parties (Pet. App. 1a). Petitioners, however, paid no greater heed to the district court's orders than they had to the FEA's. The district court accordingly issued two further orders, in April and July 1978, directing petitioners to show cause why they should not be held in contempt and again directing petitioners to comply with the Entitlements Program.[11] Both orders were preceded by hearings at which petitioners alleged their financial inability to make the required payments and asserted the right to prove their financial condition in the district court.[12] Petitioners failed, however, to present any evidence demonstrating their alleged insolvency and good faith (R. 622; Pet. App. 22a; see also R. 582-583).

Thereafter, the parties filed cross-motions for summary judgment. As the court of appeals later observed, petitioners "continued to defy the Entitlements Program" (Pet. App. 18a) and permitted their outstanding obligations to increase to $20 million. Yet another show cause hearing was held on March 17, 1980, and petitioners again failed to present evidence explaining their refusal to satisfy binding purchase orders of the agency and the court. The district

---

[11] In addition, the July 1978 order required petitioners to use AFC's recovery in another lawsuit, which was approximately $444,000, to purchase entitlements (Pet. App. 2a, 17a-18a). Petitioners did not actually purchase entitlements with these funds until September 1978.

[12] The United States had moved in the district court to limit petitioners' evidence to the evidence they had presented before the DOE. The district court, however, permitted petitioners to reopen the factual record on the issue of their ability *vel non* to comply with the various outstanding entitlement obligations and court orders.

court labelled petitioners' conduct "arrogant" (R. 582). On March 25, 1980, the district court issued an order finding petitioners in contempt and awarding the United States summary judgment with respect to all of AFC's entitlement obligations incurred from August 1975 through June 1977 (Pet. App. 1a-5a). The court dismissed the government's complaint for recovery of all entitlement obligations due after July 1977 on the ground that these obligations were "non-final" because the administrative appeal procedure regarding AFC's requests for exception relief had not been completed (*id.* at 4a).

Further hearings were held in May 1980 on the government's request for the imposition of sanctions and for the entry of a final judgment. After obtaining additional discovery materials from petitioners under threat of a bench warrant for petitioner Dalton's arrest (Pet. App. 5a), the United States demonstrated that, as of October 31, 1979, approximately $13 million in resources that could have been used to purchase entitlements had been retained and reinvested in AFC's business or had been diverted from AFC to personal accounts opened by Dalton or members of his family, or had been otherwise wasted or invested in outside ventures for Dalton's personal benefit (Pet. App. 12a; see also R. 411-423; 445-449). The district court thereafter entered judgment (Pet. App. 9a) awarding the government $941,432, plus interest in the amount of $325,459.74, for the unpaid entitlement obligations that had accrued between August 1975 and June 1977. The court also assessed a civil penalty of $1,000,000 against petitioners. In addition, the district court reiterated its dismissal of the government's complaint to the extent it involved obligations arising during or after July 1977, as to which AFC had sought administrative review.

The court of appeals affirmed the district court's judgment with respect to AFC's pre-July 1977 obligations (Pet. App. 20a-23a).[13] The court ruled that petitioners had willfully failed to comply with their obligations to purchase entitlements and that, despite numerous hearings and other opportunities to do so, petitioners "have failed to produce evidence of their inability to comply" (*id.* at 21a). In the court's words (*id.* at 22a), "[t]he cause of Arizona Fuels' financial condition is not the entitlements program, from which [petitioners] profited, but is [petitioner] Dalton's draining away from Arizona Fuels of its financial resources."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the rulings of any other federal court. The arguments advanced by petitioners focus primarily on the factual circumstances of this particular case and, in some respects, were not raised in the courts below. Further review is not warranted.

1. Petitioners first contend (Pet. 9-14) that certiorari should be granted to consider the circumstances in which "impossibility of compliance can constitute an affirmative defense to the imposition

---

[13] On the government's appeal, the court of appeals reversed the dismissal of the complaint insofar as it concerned obligations arising during or after July 1977. The court observed that, in the absence of a stay, a request for administrative review or relief does not postpone the time for compliance with DOE orders regarding the purchase or sale of entitlements (Pet. App. 19a-20a). Accordingly, the court said (*id.* at 20a), "Arizona Fuels was bound to comply with its entitlement obligations, and the district court erred in dismissing the government's complaint." Petitioners do not challenge this aspect of the court of appeals' decision.

of an award of civil penalties" (*id.* at 11). The district court found, however, on the basis of a record "replete with evidence" (Pet. App. 7a), that petitioners did not and could not demonstrate financial inability. The court of appeals agreed, observing that, "[d]espite repeated hearings and repeated opportunities since this action was filed in 1977, [petitioners] have failed to produce evidence of their inability to comply with their obligations" (Pet. App. 21a). This case therefore does not present the question petitioners ask the Court to decide.

In any event, this Court does not typically review the factual accuracy of district court findings, upheld by the court of appeals, regarding the financial solvency of individual litigants, and such a course would be especially inappropriate here. Given petitioners' repeated flouting of court orders and the diversion of corporate assets to the detriment of consumers and other refiners in the Entitlements Program, the $1,000,000 penalty imposed by the district court was a lenient one. As the court correctly observed (Pet. App. 7a), the lawful penalty could have exceeded $20,000,000.

2. Petitioners next argue (Pet. 15-18) that "the courts below exceeded the scope of judicial review by relying on evidence outside the administrative record in order to find the agency's decisions supported by substantial evidence." This assertion apparently refers to the lower courts' upholding of OHA's denial of additional exception relief from AFC's pre-July 1977 entitlement obligations. Petitioners' reconstruction of the proceedings below is confused, and, as a consequence, their interpretation of the statements of the court of appeals is incorrect.

The district court, acting on cross-motions for summary judgment, plainly found that the agency's de-

terminations were supported by "substantial evidence" (Pet. App. 7a). That determination, based on the court's review of the administrative record, was never challenged in the court of appeals. On the contrary, petitioners appealed on the ground that they should have been permitted to present additional evidence, in a de novo hearing in the district court, regarding their financial inability to satisfy their pre-July 1977 entitlement obligations. See Brief for Appellants, No. 9-53, at 20-21. Having first insisted that the district court consider evidence outside the administrative record concerning AFC's financial condition, and having then appealed on the ground that the district court did not adequately consider such evidence, petitioners are hardly in a position now to complain that materials outside the agency record were reviewed by the courts below.

In any event, the court of appeals sustained the district court's determination that the agency's decision regarding the pre-July 1977 entitlement obligations was "supported by substantial evidence" (Pet. App. 22a). The affirmance of that determination did not turn on evidence generated in the district court. One passage from the court of appeals' opinion on which petitioners rely (Pet. 17-18; Pet. App. 21a) pertained not to the agency's denial of exception relief for the pre-July 1977 period, but rather to the imposition of civil penalties based in part on petitioners' continuing refusal to satisfy those obligations in the months that followed. It was in that context that the court of appeals referred to petitioner Dalton's "borrowing" of corporate assets. The other statement that petitioners reproduce from the court of appeals' opinion (Pet. 17; Pet. App. 22a) was

merely a concluding observation regarding petitioner Dalton's "draining away" of AFC's financial resources. It was not the basis for the court's affirmance of the district court's "substantial evidence" ruling. As the court of appeals explained (Pet. App. 22a), "here there is nothing in the record to indicate that OHA knew or should have known that its action on Arizona Fuels' applications for exception relief would impose a negative profit margin on the company. And in any event, [petitioners] did not present substantial evidence before the district court showing that payment of these obligations would have forced the company to operate at a loss."

3. Finally, petitioners argue (Pet. 18-25) that, in imposing and reviewing the civil penalty against petitioners, the courts below improperly considered post-July 1977 evidence of Dalton's diversion and waste of AFC's assets. During the period from August 1975 through June 1977, however, petitioners repeatedly failed to satisfy final and unappealed entitlement obligations, and they several times flouted agency directives to purchase entitlements. These events were not denied by petitioners, and they alone were more than sufficient to justify the penalty. Moreover, as noted above, it was the failure to satisfy the pre-July 1977 entitlement obligations that was the predicate for the civil penalty. That failure continued until (and beyond) the date on which the penalty was imposed, and evidence bearing on petitioners' financial status after July 1977 was relevant to the egregiousness of petitioners' continuing violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

WILLIAM KANTER
MARK H. GALLANT
Attorneys

APRIL 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 345997 319